

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NEW YORK  
CASE NO. 14-01003

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: METROPOLITAN ESTATES INC.:  
et al, :  
: TRANSCRIPT  
vs. :  
: OF  
EMMONS-SHEEPSHEAD BAY :  
DEVELOPMENT, : MOTION  
: :  
: :  
-----

Date: December 12, 2014

Place: U.S. Bankruptcy Courthouse  
271-C Cadman Plaza East  
Brooklyn, NY 11201

B E F O R E:

HONORABLE ELIZABETH S. STONG, U.S.B.J.

TRANSCRIPT REQUESTED BY:

ROBERT A. GAVIN, Clerk of the Court

A P P E A R A N C E S:

WILLIAM CURTIN, ESQ. (via telephone)  
Trustee

LORI A. SCHWARTZ, ESQ.  
Robinson Brog Leinwand Greene Genovese & Gluck,  
P.C. (via telephone)  
Attorney for Debtor/defendant on motion

KARAMVIR DAHIYA, ESQ. (via telephone)  
Attorney for Plaintiff on motion

Transcriber, Linda Noce  
AudioEdge Transcription, LLC  
425 Eagle Rock Avenue - Suite 201  
Roseland, NJ 07068  
(973) 618-2310  
www.audioedgetranscription.com

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THE COURT: Decision	5

1 THE COURT: All right. Good afternoon. This  
2 is Judge Stong. I apologize for my lateness in taking  
3 the bench and thank you for your patience. Some  
4 unexpected matters that required prompt attention came  
5 up in court -- excuse me, in chambers. Let's get your  
6 appearance on the record, please. Since you're on the  
7 phone I'll -- I'll actually do a call. Plaintiff's  
8 counsel, Mr. Dahiya.

9 MR. DAHIYA: Yes, Ma'am. Karamvir Dahiya  
10 for the plaintiff.

11 THE COURT: Thank you. Ms. Schwartz.

12 MS. SCHWARTZ: Lori Schwartz, Robinson Brog  
13 Leinwand Greene Genovese & Gluck, for Emmons-Sheepshead  
14 Bay Development.

15 THE COURT: Mr. Curtin.

16 MR. CURTIN: Thank you, Your Honor. William  
17 Curtin for the United States Trustee.

18 THE COURT: All right. The matters on the  
19 calendar today include the status conference, the  
20 pretrial conference in this adversary proceeding, and  
21 the Court's ruling, which I'm prepared to give you, on  
22 the motion to dismiss. I propose to take up the  
23 status conference first, and then -- and Mr. Curtin,  
24 you're welcome of course to stay on the line for the  
25 adversary proceeding, but I also understand if that's

1 not something that you need to participate in, you can  
2 be excused at that point. So -- so -- so let's begin  
3 with status and debtor's counsel. Miss Schwartz, let  
4 me hear from you.

5 MS. SCHWARTZ: Thank you, Judge. There  
6 hasn't been that much activity since our last  
7 conference. I did want to let the Court know and the  
8 Trustee's office know that we received the information  
9 we needed from the plan administrator with respect to  
10 the debtor's post-confirmation disbursements. There  
11 have been no disbursements from May through November.  
12 We've prepared an affirmation that will be filed  
13 hopefully this afternoon actually. I'm advised that  
14 there have been some small discussions in December.  
15 Once the month concludes, we'll be able to catch up  
16 with that report and then the debtor will be current  
17 with respect to its reporting requirement.

18 THE COURT: All right. Anything further on  
19 status from the United States Trustee? Mr. Curtin?

20 MR. CURTIN: I think Miss Schwartz's comments  
21 cover my concerns. I was going to raise that issue.  
22 Once that's filed, we can give them an accurate number  
23 and quarterly fees (indiscernible) some quarterly fees.

24 THE COURT: All right And Mr. Dahiya,  
25 anything to add on status from your client's

1 perspective?

2 MR. DAHIYA: No, nothing, Judge.

3 THE COURT: All right. Thank you so much.

4 And I'd like to turn then to the adversary proceeding,  
5 and the pretrial conference, and of course the motion.  
6 Is there anything that would be helpful to the parties  
7 to put on the record before we turn to the motion?

8 MS. SCHWARTZ: No, Judge. I think we're  
9 prepared to hear Your Honor's decision.

10 THE COURT: Okay. And Mr. Dahiya?

11 MR. DAHIYA: No, Judge, nothing.

12 THE COURT: Mr. Curtin, you're welcome to  
13 stay, but you're free to go.

14 MR. CURTIN: I'll stay on.

15 THE COURT: All right. And -- and that  
16 brings us of course then to the motion to dismiss that  
17 has been brought in this case, and I'm prepared to  
18 proceed.

19 Before the Court is the motion of Emmons-  
20 Sheepshead Bay Development LLC, the defendant and the  
21 debtor in the main bankruptcy case, to dismiss the  
22 amended complaint in this adversary proceeding. As the  
23 record reflects, the plaintiffs in this matter are  
24 Metropolitan Estate Inc., Albert Wilk derivatively on  
25 behalf of Emmons Avenue LLC, Albert Wilk d/b/a Wilk

1 Real Estate Ltd., and Alex Dikman. Collectively I  
2 shall refer to them from time to time as the  
3 plaintiffs. The debtor is the sponsor of a  
4 condominium development known as The Breakers at  
5 Sheepshead Bay Condominium, located at 3112 Emmons  
6 Avenue, Brooklyn, and I shall refer to that from time  
7 to time as the property. The plaintiffs are unsecured  
8 creditors of the debtor, and alleged partial owners of  
9 both the debtor's predecessor company and the property.

10 The matter to be decided by the Court in  
11 today's motion is whether the defendant has shown that  
12 the plaintiffs have not met their burden to plead, and  
13 at relevant points with particularity, plausible claims  
14 sufficient to survive the scrutiny that comes with a  
15 motion to dismiss under Rule 12(b)(6). Specifically,  
16 they seek to state claims, as I'll describe in greater  
17 detail, pursuant to Bankruptcy Code Section 1144 and on  
18 related grounds, and seek the relief of revocation of  
19 the Court's order confirming the debtor's amended plan.

20 Turning to the question of jurisdiction, this  
21 Court has jurisdiction over this adversary proceeding  
22 pursuant to 28 U.S.C., Sections 157(a) and 1334, and  
23 this proceeding constitutes a core proceeding under 28  
24 U.S.C., Sections 157(b)(2)(A) and (L), among other  
25 provisions.

1           There's an extensive procedural history here,  
2           and some of the issues are not new to the Court. So I  
3           shall describe in some respects aspects of the  
4           procedural history that are relevant to this adversary  
5           proceeding and to the Court's ruling today. Of course  
6           the record controls, and I refer the parties  
7           respectfully to the entire record in the case that I  
8           have considered in assessing the motion and reaching my  
9           decision.

10           On or about August 30, 2012, there was a  
11           bankruptcy petition filed in In Re Emmons-Sheepshead  
12           Bay Development LLC case, docket number 1 in the main  
13           bankruptcy case. The debtor filed a disclosure  
14           statement some months later on February 1, 2013. On  
15           February 28, 2013, the plaintiffs filed an objection to  
16           the debtor's disclosure statement, and on that same  
17           date, February 28, 2013, the plaintiffs moved for a  
18           Rule 2004 examination of the debtor, Emmons Avenue LLC,  
19           Jacob Pinson, and T.D. Bank N.A.

20           Also in February 2013 the debtor filed an  
21           amended disclosure statement. And on April 5, 2013,  
22           the debtor filed a second amended disclosure statement  
23           and an amended plan. On that same date, April 5, 2013,  
24           the debtor filed an objection to the Rule 2004  
25           examination motion. And on April 11th, the plaintiffs

1 filed an objection to the second amended disclosure  
2 statement. On that same day the Court directed the  
3 parties to submit a proposed discovery order in  
4 connection with their various disputes.

5 On or about April 17, 2013, the Court issued  
6 an order approving the debtor's second amended  
7 disclosure statement, finding that it contained  
8 adequate information and overruling the objections that  
9 had been asserted, including by the plaintiffs here.  
10 On April 26, 2013, the Court issued a scheduling order  
11 directing the parties to serve notices of deposition or  
12 notices of Rule 2004 examination by June 21, 2013.

13 On June 25, 2013, the plaintiffs filed a  
14 motion to extend time in order to complete discovery.  
15 And on June 26, the next day, 2013, the plaintiffs  
16 submitted their ballot voting against confirmation of  
17 the debtor's amended plan. On that same day, June 26,  
18 2013, the plaintiffs filed a motion to compel a  
19 response to discovery requests, and also filed an  
20 objection to the confirmation of the amended plan.

21 On July 3, 2013, the Court issued an order  
22 approving and confirming the debtor's Chapter 7 --  
23 excuse me, Chapter 11 amended plan and found, among  
24 other things, that it had been proposed in good faith.  
25 This Court overruled all of the objections that had



1       been asserted to the amended plan. And I'll refer from  
2       time to time to that July 3, 2013 order as the  
3       confirmation order.

4               Moving ahead. On July 17, 2013, the  
5       plaintiffs made a motion to reconsider or vacate entry  
6       of the confirmation order. About five or six weeks  
7       later on August 28, 2013, the Court denied the  
8       plaintiff's motion to vacate the confirmation. And on  
9       or about Oct -- excuse me, November 26, 2013, according  
10      to the debtor and pursuant to the confirmed amended  
11      plan, property was sold to a third party, 3112 Emmons  
12      Lofts LLC.

13             On January 6, 2014, the plaintiffs commenced  
14      this adversary proceeding which seeks the revocation of  
15      the confirmation order entered by this Court pursuant  
16      to Bankruptcy Code Section 1144. Some months later on  
17      April 16, 2014, the plaintiffs filed an amended  
18      complaint pursuant to an order of the Court granting a  
19      final extension of time within which to amend the  
20      complaint. And on April 17, the plaintiffs amended the  
21      caption of that amended complaint. That is the  
22      operative complaint, that amended complaint. And on  
23      July 30, 2014, the defendant filed this motion to  
24      dismiss the adversary proceedings, which I shall refer  
25      to from time to time as the motion to dismiss. That

1 motion was fully and amply briefed by the parties.

2 The plaintiffs filed an affirmation in  
3 opposition to the motion to dismiss on September 8,  
4 2014. And the next day, September 9, 2014, the Court  
5 held a continued pretrial conference on the adversary  
6 proceeding and hearing on the motion to dismiss.

7 About two weeks later, on September 23, 2014,  
8 in the District Court, the District Court denied the  
9 plaintiff's appeal of this Court's denial of the motion  
10 to vacation confirmation, entering an opinion and order  
11 to that effect.

12 On October 17, 2014, the debtor filed a reply  
13 to the plaintiff's opposition. The Court held a  
14 continued pretrial conference on the adversary  
15 proceeding and a continued hearing on the motion to  
16 dismiss on November 25, 2014, just a few weeks ago. I  
17 closed the record and reserved decision on the motion  
18 to dismiss, and that brings us to today where, as  
19 indicated on the record, I am prepared to issue my oral  
20 ruling on that motion.

21 By this motion, the defendant seeks the  
22 following relief. In substance, the entry of an order  
23 pursuant to Federal Rule of Civil Procedure 12(b)(6),  
24 made applicable here by the Federal Rule of Bankruptcy  
25 Procedure 7012, dismissing the amended complaint for

1 failure to state a claim upon which relief may be  
2 granted. Where appropriate, to the extent that the  
3 plaintiff's claim sound in fraud, the defendant also  
4 invokes Federal Rule of Civil Procedure 9(b). And  
5 finally, the defendant seeks definitive relief in that  
6 the defendant also seeks that the dismissal be with  
7 prejudice and without leave to re-plead.

8 I turn to the background, going beyond the  
9 procedural history, and I draw this summary of the  
10 background from the record in the case, including the  
11 amended complaint, the well pleaded allegations of  
12 which on a motion to dismiss are taken as true, the  
13 defendant's motion to dismiss, and the District Court's  
14 denial of the plaintiff's appeal of this Court's  
15 decision on the motion to vacate the order of  
16 confirmation.

17 The debtor, Emmons-Sheepshead Bay Development  
18 LLC, also the defendant in this matter, as indicated  
19 previously filed a petition for relief under Chapter 11  
20 of the United States Bankruptcy Code on or about August  
21 30, 2012. The debtor is the sponsor of a condominium  
22 development known as The Breakers at Sheepshead Bay  
23 Condominium located, again as noted above, at 3112  
24 Emmons Avenue, Brooklyn. That property was the sole  
25 substantial asset of the debtor. The plaintiffs here,

1 again as previously identified, are Metropolitan  
2 Estates Incorporated, sometimes referred to as  
3 Metropolitan, Alex Dikman, the principal of  
4 Metropolitan, and Albert Wilk, a real estate broker as  
5 Wilk Real Estate Limited, and Emmons Avenue LLC, which  
6 I'll refer to sometimes as Emmons.

7 The plaintiffs are unsecured creditors of the  
8 debtor and alleged partial owners of both the debtor's  
9 predecessory (sic) company and the property.  
10 Metropolitan owns a 10 percent ownership of Emmons and  
11 asserts the right to bring this suit derivatively.

12 The plaintiffs participated as indicated in  
13 the extensive procedural history, only a portion of  
14 which I have summarized on the record of today's  
15 hearing, in this bankruptcy case, including in many  
16 hearings and at many junctures of the process leading  
17 up to the confirmation of the debtor's amended plan.  
18 The plaintiff's participation included among other  
19 things, opposition to the debtor's initial disclosure  
20 statement and the second amended disclosure statement  
21 and the debtor's plan. They also participated by  
22 seeking discovery pursuant to the bankruptcy code and  
23 rules.

24 In their objection to the second amended  
25 disclosure statement, the plaintiffs argued that it did

1 not contain adequate information pursuant to Bankruptcy  
2 Code Section 1125(b) because the plaintiffs were  
3 seeking information through discovery related to, and  
4 now I quote, "potentially fraudulent assignments and  
5 conveyances, unauthorized modifications, undisclosed  
6 disbursements, and potential siphoning of funds that  
7 bears directly on the administration of the debtor's  
8 estate."

9 Before the discovery deadline set by the  
10 Court, the parties also engaged in settlement  
11 discussions. The debtor at one point made a settlement  
12 offer, and the plaintiffs questioned whether it was  
13 consistent with or disparate from the positions taken  
14 in the negotiations. By contrast, the plaintiffs  
15 argued that the debtor had negotiated in bad faith, and  
16 that for those reasons the plaintiff should be granted  
17 a further extension of the discovery period. The  
18 plaintiffs also objected to confirmation of the amended  
19 plan. They appeared at and participated in the hearing  
20 and the confirmation of the amended plan, throughout  
21 this process represented zealously by counsel, and they  
22 voted against the confirmation of the amended plan.

23 In their objection to the amended plan, the  
24 plaintiffs argued that the amended plan was not  
25 proposed in good faith and therefore it violated the

1 requirement of the Bankruptcy Code Section 1129(a)(3)  
2 that a plan be proposed in good faith and not by any  
3 means prohibited by law. They also argued that their  
4 discovery was not complete.

5 The Court heard and considered with care each  
6 and all of the objections to confirmation, overruled  
7 the objections to confirmation, and entered the  
8 confirmation order on July 3, 2013, finding among many  
9 other things that the amended plan was proposed in good  
10 faith. All objections were overruled.

11 Thereafter, the plaintiffs moved to vacate  
12 the confirmation order. The Court denied the motion to  
13 vacate confirmation. That order was appealed -- excuse  
14 me. The plaintiffs then appealed the Court's order  
15 confirming the amended plan to the District Court.  
16 That appeal was denied. Judge Mauskopf found that the  
17 appeal contained several procedural deficiencies, and  
18 separately found that the plaintiffs had not  
19 established a basis to vacate the confirmation of the  
20 amended plan. The District Court also rejected the  
21 plaintiff's due process claims and closely chronicled  
22 the full process that plaintiffs undertook leading up  
23 to and during the confirmation process and hearing, and  
24 the District Court concluded that, and now I quote,  
25 "The Bankruptcy Court assiduously protected

1 Metropolitan's due process rights during the  
2 proceedings below, and Metropolitan participated  
3 aggressively at each stage of the pre-confirmation  
4 bankruptcy process. The premise that Metropolitan was  
5 denied due process is simply unsupportable," Emmons-  
6 Sheepshead Bay memorandum and order, 13-CB-5430, a  
7 decision of the United States District Court for the  
8 district -- for the Eastern District of New York, at  
9 Page 17.

10 Let me turn to the amended complaint. In  
11 their amended complaint the plaintiffs attempt to  
12 assert a claim under Bankruptcy Code Section 1144 for  
13 the revocation of this Court's order of confirmation of  
14 the amended plan, as well as, now I quote, "the  
15 debtor's discharge" on the grounds that the  
16 confirmation order was procured by fraud caused by,  
17 among other things, a lack of due process and a lack of  
18 candor by the debtor. Among other things the  
19 plaintiffs argue in substance that the debtor and its  
20 principals committed fraud on the Court by  
21 misrepresenting the value of the property.

22 The plaintiffs set forth in the amended  
23 complaint a detailed narrative of the events related to  
24 the property prior to the debtor's bankruptcy filing.  
25 These include, drawing from the amended complaint, the

1 following. The plaintiffs allege that under a January  
2 13, 2005, written agreement, Metropolitan agreed to  
3 provide \$1.5 million in funding to Emmons, which then  
4 owned the property. The plaintiffs state that the 2005  
5 agreement promised repayments in the form of a \$1.5  
6 million payment and an additional 1.5 million of  
7 profits, and also granted Metropolitan a 10 percent  
8 ownership interest in both the property and in Emmons.  
9 The amended complaint reports that Metropolitan  
10 performed its obligations to provide those funds to  
11 Emmons.

12 The plaintiffs allege that despite an  
13 "implied understanding", that Emmons would not modify  
14 the existing mortgages on the property without  
15 Metropolitan's consent. Emmons and the debtor executed  
16 multiple mortgage modifications and new mortgages with  
17 the consent of Metropolitan in both 2006 and 2007,  
18 which raised the minimum release price of each  
19 condominium unit, increased Emmons' debt from 23  
20 million to over 30 million, and consolidated Emmons'  
21 loans. According to the plaintiffs, Emmons conveyed  
22 the property to the debtor on September 29, 2007, for  
23 no consideration, outside the ordinary course of  
24 business, and without notice to or consent by  
25 Metropolitan. The plaintiffs state that after the



1 transfer, Emmons and the debtor again modified the  
2 mortgages on the property to provide its secured  
3 lender, T.D. Bank, with more favorable terms. And the  
4 plaintiffs allege that beginning in May 2011,  
5 Metropolitan repeatedly contacted Emmons to access its  
6 books and records to assess whether it had violated the  
7 2005 agreement. The plaintiffs allege that despite  
8 Metropolitan's assertions of entitlement as partial  
9 owner of Emmons to information related to the property,  
10 Emmons did not respond to Metropolitan's requests. The  
11 plaintiff sued the debtor, Emmons, and Emmons'  
12 principals in state court prior to the bankruptcy  
13 filing related to some or all of these concerns.

14           The plaintiffs in the amended complaint here  
15 before this Court also make allegations related to the  
16 debtor's bankruptcy petition and process leading to the  
17 entry of the confirmation order. In substance they  
18 argue that the debtor misrepresented the value of the  
19 property. The plaintiffs also argue, among other  
20 things, that counsel for the debtor mislead the Court  
21 that an expedited confirmation hearing was necessary on  
22 the basis, now quoting, "false pretense that investors  
23 would walk away." The value of the property was  
24 listed in the debtor's filings as 14 million, but  
25 plaintiffs assert in substance that the fact that the

1 property eventually sold for a price of some \$30  
2 million demonstrates that the debtor's bankruptcy  
3 petition deliberately mis-stated the property's value.  
4 During the pendency of the debtor's Chapter 11's case,  
5 the debtor appeared and moved in the 2004 examination  
6 motion to examine the debtor's officers, books, and  
7 records. The plaintiffs also objected to the debtor's  
8 second amended disclosure statement, to the continuing  
9 compensation of Jacob Pinson, the principal of the  
10 debtor, and to the confirmation of the debtor's plan.  
11 Excuse me, the debtor's amended plan.

12 Prior to the confirmation of the amended  
13 plan, the plaintiffs argued that discovery and issues  
14 of disclosure remained in dispute and that the Court  
15 should grant a further extension of discovery due to  
16 the "total secrecy about the basis of the numbers  
17 regarding liability and assets of the debtor and also  
18 contentions of the debtor regarding creditors." The  
19 plaintiffs allege that after the Court issued its April  
20 26, 2013 scheduling order setting the June 21, 2013  
21 discovery deadlines, the debtor negotiated in bad faith  
22 to prevent the plaintiff from seeking discovery. On  
23 June 18, 2013, the plaintiff requested a further  
24 extension of discovery, which the Court denied.

25 The plaintiffs also allege that the debtor's

1 principal, Jacob Pinson, siphoned off the corporate  
2 debtor's assets, sold property units at higher prices  
3 than disclosed to the Court, and concealed these facts  
4 from the Court. They allege that the amended plan  
5 relieved him of personal liability on a mortgage on his  
6 personal residence. And the plaintiff's also make  
7 allegations about events after the confirmation of the  
8 amended plan, including that the property was  
9 immediately conveyed without marketing to maximize the  
10 sale price, but they do not specifically describe the  
11 relevance of events after the entry of the confirmation  
12 order to their allegations and their claim that there  
13 was fraud in the procurement of that confirmation  
14 order.

15 In the plaintiff's first count, Count One,  
16 they seek relief pursuant to Bankruptcy Code Section  
17 1144 and argue that "had the debtor made full candid  
18 and complete disclosures to the Court regarding the  
19 value of the property, the debtor would not have  
20 satisfied the requirement" of good faith pursuant to  
21 Section 1129.

22 The plaintiffs plead three additional claims  
23 essentially grounded in these same concerns, and argue  
24 in substance that these claims support their  
25 allegations of a fraud in the procurement of the

1 confirmation order.

2 In Count Two the plaintiffs challenge the  
3 validity of the transfer of the property, and assert  
4 that the property was not property of the debtor's  
5 estate pursuant to Bankruptcy Code Section 541 because  
6 it was transferred to the debtor from its predecessor  
7 Emmons for no consideration and outside the ordinary  
8 course of business. The plaintiffs argue in substance  
9 that had this information been disclosed to the Court,  
10 the amended plan would not have been confirmed because  
11 "the sole asset that supports the plan was not part of  
12 the bankruptcy estate."

13 In Count Three, the plaintiffs allege that  
14 the amended plan violates the absolute priority rule  
15 because the principal of the debtor benefits from the  
16 amended plan, but the unsecured creditors do not. The  
17 plaintiffs claim that the debtor's principal received a  
18 discharge of personal liability on his primary  
19 residence. They also allege that the lender, counsel,  
20 and principal of the debtor colluded to abuse the  
21 bankruptcy process for their personal benefit. They  
22 maintain that the withholding of information and access  
23 to the debtor's records, the sale of the property to  
24 the debtor, and the eventual sale of the property by  
25 the debtor under the confirmed plan are all indicators

1 of the abuse of the process and of defrauding the  
2 plaintiffs and misleading this Court.

3 Finally, in Court Four the plaintiffs allege  
4 that the denials of their discovery requests and the  
5 debtor's withholding of material information constitute  
6 a due process violation, and separately a basis for  
7 revoking the confirmation order.

8 I turn to the motion to dismiss the amended  
9 complaint. The debtor defendant here seeks dismissal  
10 of the amended complaint for failure to state a claim  
11 upon which relief may be granted, and requests that the  
12 amended complaint be dismissed with prejudice and  
13 without leave to re-plead. The defendant notes that  
14 the only basis for a revocation of the confirmation  
15 order is that the order was procured by fraud, and  
16 argues that the plaintiffs have not met their pleading  
17 burden. Defendant argues that the amended complaint  
18 fails to plead with particularity plausible allegations  
19 that are sufficient to state the plaintiff's claim that  
20 the confirmation order was procured by fraud, pursuant  
21 to Section 1144.

22 The debtor argues that the amended complaint  
23 contains no new allegations or arguments, and that each  
24 of the plaintiff's claims has already been asserted and  
25 found by this Court or by the District Court to be

1 without merit. The defendant additionally argues that  
2 issues raised in this proceeding are duplicative of the  
3 allegations in the plaintiff's appeal of the order  
4 denying the motion to vacate confirmation, which has  
5 since been -- which appeal has since been rejected by  
6 the District Court. And the defendant states that the  
7 District Court's decision should be relied upon as the  
8 final adjudication of this matter.

9 The defendant argues that the plaintiff's  
10 objection to confirmation of the amended plan was  
11 limited to whether the amended plan was proposed in  
12 good faith pursuant to Bankruptcy Code Section  
13 1129(a)(3), where the Court applied the good faith  
14 standard and found the amended plan to be in  
15 compliance. The defendant argues that the Court's  
16 conclusions as to good faith demonstrate the absence of  
17 fraud.

18 As to valuation of the property, the  
19 defendant argues that the defendant's petition  
20 described the \$14 million valuation of the property as  
21 "estimated and subject to appraisal by a court of  
22 competent jurisdiction." As a result, the debtor  
23 states that its statements as to the property's value  
24 are not fraudulent even when viewed in light of the  
25 ultimate \$30 million sale price.

1           The debtor also states as the debtor in this  
2       -- excuse me, the defendant in this adversary  
3       proceeding also states that as the debtor in this  
4       Chapter 11 case it fully disclosed to the Court,  
5       including on the debtor's second amended disclosure  
6       statement, information about the transfer of ownership  
7       of the property and about the agreements between the  
8       debtor and the plaintiffs.

9           The debtor argues that many of the  
10       allegations in the amended complaint do not support the  
11       conclusion that there was fraud in the procurement of  
12       the confirmation order. These include the plaintiff's  
13       allegations with respect to their Rule 2004  
14       application, their objections to the debtor's second  
15       amended disclosure statement, their allegations and  
16       assertions with respect to the settlement negotiations,  
17       and their allegations about whether the properties,  
18       property of the estate, was fraudulently conveyed or  
19       was subject to the imposition of a constructive trust.

20           As to the plaintiff's allegations that they  
21       were denied due process, the defendant notes that the  
22       plaintiffs participated extensively in the debtor's  
23       bankruptcy case, and the defendant notes that failing  
24       to succeed in an argument is simply not the same as a  
25       due process violation.

1           In response to the plaintiff's arguments that  
2           the state court held that a constructive trust exists  
3           on the property, the defendant maintains that the state  
4           court did not reach the merits of adjudicating these  
5           allegations before the debtor's bankruptcy filing, and  
6           argues that the plaintiffs have not pleaded the  
7           existence of a contrary judgment by the state court.

8           Finally, the defendant argues that Section  
9           1144 of the Bankruptcy Code gives this Court a wide  
10          discretion in deciding whether to revoke a confirmation  
11          order. In light of the sale of the property, the  
12          defendant argues that mootness and the reliance of the  
13          third-party purchase make revocation both impractical  
14          and inequitable.

15          Finally, the defendant requests that this  
16          Court dismiss the amended complaint with prejudice and  
17          without leave to re-plead. The defendant argues in  
18          its reply to the plaintiff's opposition that the  
19          plaintiff should not have leave to re-plead because  
20          they cannot state a plausible claim for relief,  
21          including under Bankruptcy Code Section 1144.  
22          Moreover, the defendant knows that the plaintiffs have  
23          already amended this complaint once, and separately  
24          that they have made substantially these same  
25          allegations within the framework of the motion to



1 vacate confirmation and in other contexts over the  
2 course of this bankruptcy case. Those issues, the  
3 defendant notes, have been decided by this Court and  
4 affirmed on appeal. The defendant also notes that  
5 leave to re-plead would impose significant cost burdens  
6 and delay on the debtor inasmuch as it would require  
7 the re-litigation of issues that this Court has already  
8 determined.

9 The plaintiff responded extensively to the  
10 motion to dismiss, and the plaintiffs make several  
11 arguments. They argue that the buyer of the property,  
12 3112 Emmons Lofts LLC, was a sham third party entity  
13 created by counsel for the debtor. As such, the  
14 plaintiffs argue that there is no innocent buyer, and  
15 revocation therefore should not be within the wide  
16 discretion of this Court.

17 The plaintiffs state that the debtor violated  
18 its fiduciary duties to the estate by failing to sell  
19 the property for maximum value due to an alleged lack  
20 of marketing or disclosure. The plaintiffs also argue  
21 that this Court has not determined whether the state  
22 court held that the property was subject to the  
23 imposition of a constructive trust.

24 Turning to their fraud allegations, the  
25 plaintiffs argue that the debtor's counsel represented

1 to this Court at the time of plan confirmation the  
2 potential of losing investors in order to create time  
3 pressure to confirm the amended plan. The plaintiffs  
4 argue that the debtor's counsel made misrepresentations  
5 to the Court about the value of the property and about  
6 water damage to the property. And the plaintiffs argue  
7 that the debtor's counsel made misrepresentations to  
8 this Court about negotiating in good faith in the  
9 context of a prospective settlement with counsel for  
10 the plaintiffs.

11 The plaintiffs also argue that the Twombly  
12 pleading standard as articulated by the United States  
13 Supreme Court, that is whether the complaint states a  
14 plausible claim for relief, is not applicable here  
15 because the defendant, the defendant has exclusive  
16 custody and control of the relevant records.

17 I turn now briefly to the applicable rules,  
18 the Bankruptcy Rules and the Federal Rules of Civil  
19 Procedure. The starting point of course is Federal  
20 Rule of Civil Procedure 12(b)(6) made applicable to  
21 this adversary proceeding by Federal Rule of Bankruptcy  
22 Procedure 7012. That states that a complaint must  
23 contain a claim upon which relief can be granted.

24 As the Supreme Court has explained, to  
25 survive a motion to dismiss under Rule 12(b)(6), "A

1 complaint must contain sufficient factual matter  
2 accepted as true to state a claim to relief that is  
3 plausible on its face," Ashcroft vs. Iqbal, 556 U.S.  
4 662, at 678 (2009).

5 Plausibility "is not akin to a probability  
6 requirement," as courts in this district and circuit  
7 have held. Rather, plausibility requires, again  
8 quoting, "more than a sheer possibility that a  
9 defendant has acted unlawfully," In Re Dreier LLP, 452  
10 B.R. 391, 406, Bankruptcy SDNY (2011), quoting Iqbal,  
11 556 U.S., at 677.

12 As the Supreme Court has further explained,  
13 the "factual allegations must be enough to raise a  
14 right to relief above the speculative level," Bell  
15 Atlantic Corp. vs. Twombly, 550 U.S. 544, at 555  
16 (2007).

17 A motion to dismiss under Rule 12(b)(6)  
18 requires the Court to apply those standards in a  
19 particular context. First the Court must accept all  
20 factual allegations, all well pleaded factual  
21 allegations as true, and must draw all reasonable  
22 inferences in favor of the plaintiff. So found the  
23 Second Circuit in DiFolco vs. MSNBC Cable L.L.C., 622  
24 F.3rd, at 110-11.

25 Next, the Court considers whether these well

1       pleaded allegations state a plausible claim for relief.  
2       So found the Court in In Re Dreier, 452 B.R., at 407.

3               The concept of a well pleaded factual  
4       allegation requires careful consideration and "the  
5       tenet that a Court must accept as true all of the  
6       allegations contained in a complaint is inapplicable to  
7       legal conclusions."     So found the Supreme Court in  
8       Iqbal, 556 U.S., at 678.   Threadbare recitals of the  
9       elements of a cause of action supported by mere  
10      conclusory statements do not suffice.   Again, Iqbal,  
11      556 U.S., at 678.

12              In deciding a Rule 12(b)(6) motion, a Court  
13      may "permissibly consider documents other than the  
14      complaint, such as documents that are attached to the  
15      complaint or incorporated in it by reference," Roth vs.  
16      Jennings, 489 F.3rd 499, at 509, 2nd Circuit (2007).

17              A Court may also continue -- consider --  
18      excuse me.   A Court may also consider "even if not  
19      attached or incorporated by reference, a document upon  
20      which the complaint solely relies and which is integral  
21      to the complaint.   This principle has its greatest  
22      applicability in cases alleging fraud, when a complaint  
23      alleges, for example, that a document failed to  
24      disclose certain facts, it is appropriate for the Court  
25      in considering a Rule 12(b)(6) motion to examine the

1 document to see whether or not those facts were  
2 disclosed," Roth, 489 F.3rd, at 509.

3 And finally, it is the plaintiff's obligation  
4 to provide the grounds of his entitlement to relief,  
5 Bell Atlantic vs. Twombly, 550 U.S. 544, at 555 (2007).  
6 On a motion to dismiss, it is the movant that bears the  
7 burden.

8 Claims of fraud invoke additional  
9 considerations under the Federal Rules of Civil  
10 Procedure, because such claims, the rules provide and  
11 countless cases have confirmed, must be pleaded with  
12 particularity. For example, as the rule states in its  
13 plain terms, in alleging fraud or mistake, a party must  
14 state with particularity the circumstances constituting  
15 fraud or mistake. Malice, intent, knowledge, and other  
16 conditions of a person mind may be alleged generally.  
17 So provides Rule 9(b).

18 "The primary purpose," now quoting, "of Rule  
19 9(b) is to afford defendant fair notice of the  
20 plaintiff's claim and the factual ground upon which it  
21 is based. Rule 9(b) also safeguards defendant's  
22 reputation and good will from improvident charges of  
23 wrongdoing, and it serves to inhibit the institution of  
24 strike suits," Ross vs. Bolton, 904 F.2nd 819, at 823,  
25 2nd Circuit (1990).

1           The Second Circuit has read Rule 9(b), now  
2     quoting, "to require that a complaint alleging fraud  
3     (1) specify the statements the plaintiffs contend were  
4     fraudulent, (2) identify the speaker, (3) state where  
5     and when the statements were made, and (4) explain why  
6     the statements were fraudulent," Rombach vs. Chang, 355  
7     F.3rd 164, at 170, 2nd Circuit (2004).

8           While intent may be alleged generally, the  
9     2nd Circuit has nonetheless held that a plaintiff must  
10    allege facts that give rise to a strong inference of  
11    fraudulent intent. So found the Bankruptcy Court in In  
12    Re Motors Liquidation Co., 462 B.R. 494, at 505. The  
13    Second Circuit has explained that this strong inference  
14    of fraudulent intent may be satisfied either "(a) by  
15    alleging facts to show that defendants had both motive  
16    and opportunity to commit fraud, or (b) by alleging  
17    facts that constitute strong circumstantial evidence of  
18    conscious misbehavior or recklessness," Ganino vs.  
19    Citizens Utilities Co., 228 F.3rd 154, at 168, 169, 2nd  
20    Circuit (2000), quoting Shields vs. Citytrust Bancorp  
21    Incorporated, 25 F.3rd 1124, and 1129 through 30, 2nd  
22    Circuit (1994).

23           I turn to the central bankruptcy code section  
24    at issue in this matter, Section 1144, which permits  
25    revocation of an order of confirmation. Bankruptcy

1 Code Section 1144 provides that on request of a party  
2 in interest at any time before 180 days after the entry  
3 of the order of confirmation, and after notice and a  
4 hearing, the Court may revoke such order if and only if  
5 such order was procured by fraud. An order under this  
6 section revoking an order of confirmation shall contain  
7 such provisions as are necessary to protect any entity  
8 acquiring rights in good faith reliance on the order of  
9 confirmation and revoke the discharge of the debtor.  
10 So says the rule.

11 Revocation pursuant to Section 1144 is  
12 discretionary, and the Court may but need not revoke  
13 the confirmation order if it finds fraud; Salzburg vs.  
14 Trico Marine Services, 337 B.R. 811, at 814, Bankruptcy  
15 Court of Southern District of New York (2006). And as  
16 that same Court has explained, the statute says "the  
17 Court may revoke such order. The importance of the  
18 auxiliary verb may is that the decision of whether to  
19 revoke a confirmation order rests in the sound  
20 discretion of the Court," Investment Partners LP (sic)  
21 vs. Comair, In Re Delta Air Lines Incorporated, 386  
22 B.R. 518, at 532, Bankruptcy Southern District of New  
23 York (2008).

24 I turn to the element and considerations of  
25 fraud in the procurement of the confirmation order.

1 Fraud is not defined in the bankruptcy code in the  
2 context of Section 1144. It has been generally  
3 interpreted by courts to require the party seeking  
4 revocation of a confirmation order to demonstrate  
5 actual fraudulent intent in the procurement of the  
6 confirmation order. One court in this circuit has  
7 opined that while the term fraud has never been defined  
8 by congress for fear that the craft of men should find  
9 ways of committing fraud which might evade such a  
10 definition, there can never be a showing of fraud  
11 without proof of bad faith. So wrote the Court in  
12 Farley vs. Coffee Cupboard, 119 B.R. 14, at 18,  
13 (E.D.N.Y. 1990).

14 The Sixth Circuit has held that a party may  
15 prove fraud with circumstantial evidence by  
16 establishing the following elements typical of other  
17 fraud claims. A representation or intentional omission  
18 by the plan proponent regarding compliance with 1129,  
19 one; two, which was materially false; three, that was  
20 either known by the debtor to be false or was made  
21 without belief in its truth, or was made with reckless  
22 disregard for the truth; four, that was made to induce  
23 the Court to rely upon it; five, that the Court did  
24 rely upon; and six finally, that as a consequence of  
25 such reliance the Court entered a confirmation order.



1     TENN-FLA Partners vs. First Union National Bank of  
2     Florida, In Re TENN-FLA Partners, 229 B.R. 720, at 730,  
3     Western District of Tennessee (1999), affirmed 26 F.3rd  
4     746, at 750, Sixth Circuit (2000).

5             The Sixth Circuit further explained, this is  
6     important, that the movant must show a fraud  
7     perpetrated on the Court and not on a creditor, In Re  
8     TENN-FLA Partners, 229 B.R., at 730. In one case, the  
9     Bankruptcy Court for the Southern District of New York  
10    focused on the fact that in order for fraud to have  
11    procured the confirmation order, "it should be shown  
12    that at least some of the creditors would have voted  
13    differently absent the alleged fraud, given that the  
14    Court is bound by the vote of creditors when issuing  
15    its confirmation order," In Re Delta Air Lines, 386  
16    B.R., at 533, 34. The Court in Delta Air Lines thus  
17    distinguished between the ability to state a Section  
18    1144 claim for revoking a plan based on a suit brought  
19    by creditors "on the grounds that they were defrauded  
20    into voting into it, voting for it" as compared to a  
21    suit brought by parties who had no right to vote on  
22    confirmation, or as compared to suits not joined by  
23    parties that voted for confirmation of a plan who could  
24    demonstrate that fraud procured their votes for the  
25    plan," In Re Delta, 386 B.R., at 534.

1           Within the Tenth Circuit, one bankruptcy  
2 court focused on the reliance of the Court in entering  
3 the confirmation order, and held that a movant had  
4 failed to allege facts sufficient to satisfy the fraud  
5 element of a Section 1144 claim because the relevant  
6 complaint failed to describe any fraud that was used to  
7 induce the Court into reliance." Bowman v. Bennington,  
8 In Re Bennington, 519 B.R. 545, at 548, Bankruptcy  
9 District of Utah (2014).

10           In that case, in the Bennington case, the  
11 Court explained that the complaint did "not allege any  
12 connection between the alleged fraud and the Court's  
13 decision to enter the confirmation order," In Re  
14 Bennington, 519 B.R., at 548. And the Court in In Re  
15 Bennington states that one reason the movant's  
16 allegations failed to state a claim under Section 1144  
17 was that the alleged fraud had already been called to  
18 the attention of the Court and creditors prior to or at  
19 the confirmation hearing, and accordingly there could  
20 be no reliance; In Re Bennington, 519 B.R., at 549. As  
21 the Court stated, the allegations of fraud and Bowman's  
22 objection to the debtor's disclosure statement and  
23 Bowman's motion to dismiss were made known to the Court  
24 and creditors well before the hearing on confirmation  
25 and therefore cannot serve as a basis to revoke the

1 debtor's confirmation order under Section 1144. In Re  
2 Bennington, 519 B.R., at 549.

3 As to alleging fraudulent intent, the  
4 Southern District of New York Bankruptcy Court has  
5 explained that "to secure relief under Section 1144 of  
6 the code, a movant must point to specific acts of the  
7 debtor evidencing actual fraudulent intent.

8 Interference, without more, is insufficient."

9 Morgenstern vs. Motors Liquidation Co., In Re Motors  
10 Liquidation Co., 462 B.R. 494, at 505 to 510,  
11 Bankruptcy Southern District of New York (2012).

12 I note to similar effect the decisions of  
13 Bankruptcy Courts in this circuit in In Re Calpine, 389  
14 B.R. 323, at 324, Southern District of New York (2008)  
15 where the Court explained that revocation under Section  
16 1144 requires a showing of actual fraud, and a case  
17 cited in the Calpine case, In Re Hertz, 38 B.R. 215, at  
18 220, Bankruptcy Southern District of New York (1984).

19 As such, and as an example, in In Re Motors  
20 Liquidation, the Southern District of New York  
21 Bankruptcy Court analyzed the Section 1144 complaint by  
22 considering the two paths to pleading fraudulent intent  
23 set out by the Second Circuit in the Citytrust Bancorp  
24 decision. First, motive and opportunity, and second,  
25 strong circumstantial evidence of conscious misbehavior

1       recklessness. The Southern District of New York  
2       Bankruptcy Court noted regarding the motive and  
3       opportunity analysis, well traveled ground in this  
4       circuit, that "though technically speaking any plan  
5       proponent putting forward a plan for confirmation has  
6       an opportunity to defraud the Court. In this context,  
7       opportunity must mean something more. It should mean a  
8       juncture in the case where the plan proponent reaches  
9       the decision point or opportunity to present a plan  
10      that would not defraud the Court and elects not to do  
11      it." In Re Motors Liquidation Corp., 462 B.R., at 507.

12               I turn to the question in a general way of  
13      whether -- of another element to be considered by  
14      courts in the context of requests for relief under  
15      Bankruptcy Code Section 1144, and that is whether there  
16      can be entered a remedial order able to protect  
17      innocent third parties. As the code plainly provides,  
18      to grant relief pursuant to Section 1144, a Court must  
19      additionally be able to craft an effective remedial  
20      order that satisfies Section 1144's directive to  
21      "protect any entity acquiring rights in good faith  
22      reliance on the order of confirmation."

23               If a Court cannot fashion a revocation order  
24      that protects innocent third parties who acquired  
25      rights in reliance on the confirmation order, the Court

1 is barred, barred from revoking the confirmation order  
2 even if the order was procured by fraud. So found the  
3 Court in In Re Delta Airlines, 386 BR., at 532. In In  
4 Re Trico Marine is one example. The Southern District  
5 of New York Bankruptcy Court dismissed a claim brought  
6 under Section 1144 because even if the plaintiff could  
7 prove fraud, it "would be exceedingly difficult to  
8 unwind the plan and impossible to protect innocent  
9 third parties," In Re Trico Marine, 343 BR., at 71,  
10 where the Court noted that, "complex plans involving  
11 transactions among the debtor, its creditors, and third  
12 parties obviously present greater problems in crafting  
13 such an order." That decision was affirmed by the  
14 Southern District District Court and the Second  
15 Circuit. And in reviewing the Trico Marine Bankruptcy  
16 Court's decision, the District Court further explained  
17 that a Court may not grant revocation of a plan  
18 confirmation order unless it can fashion an order that  
19 would restore the status quo existing before  
20 confirmation and protect those who relied in good faith  
21 on confirmation. Salzburg vs. Trico Marine Services,  
22 In Re Trico Marine reported at 382 BR., 201 and 206,  
23 affirmed at 340 F. Appendix 55, Second Circuit (2009).

24 I now turn to considerations of the questions  
25 surrounding Section 1144 as a limitation, as a

1 limitation on collateral challenges to confirmation  
2 orders. The finality of a confirmation order has  
3 consequence for the entire restructuring process. To  
4 that end, courts recognize that "given concerns over  
5 the finality of a confirmed plan, it is well  
6 established that a confirmation order may be revoked  
7 only if it was procured by fraud," Byasen vs. R. Capita  
8 Bank, 2014 Westlaw, 6435522, at Star Bankruptcy,  
9 Southern District of New York, November 17, 2014.

10 In another case that Court also stated fraud,  
11 which must be on the Court, is the only basis upon  
12 which the confirmation order may be revoked. In Re  
13 Motors Liquidation Co., 462 BR., at 5 somewhere and 505  
14 through 510. To the same effect, Sunny vs. Rayburn,  
15 972 F. Supp. 2nd, 308, at 315.

16 As another circuit, the Ninth Circuit has  
17 similarly explained, Section 1144 of the Bankruptcy  
18 Code is the only avenue for revoking a confirmed  
19 Chapter 11 plan. Creditors may not otherwise  
20 collaterally attack a confirmed plan even where the  
21 plan contains illegal provisions. Debt Acquisition Co.  
22 Of America vs. Leonard, In Re Asset Resolution LLC.,  
23 542 F. Appendix, 578, at 579, Ninth Circuit (2013).

24 That same circuit has elsewhere opined that  
25 congress has determined, now quoting, "that a 180 day

1 limitations period strikes the appropriate balance  
2 between the strong need for finality in reorganization  
3 plans and the interest in affording parties in interest  
4 a reasonable opportunity to discover and assert fraud.  
5 In recognition of the strength of the interests in  
6 finality of reorganization plans, courts have held  
7 uniformly that strict compliance with Section 1144 is a  
8 prerequisite to relief." So found that Circuit in In  
9 Re Orangetree Associates Ltd, 961 F.2nd 1445, at 1447,  
10 Ninth Circuit (1992).

11 I turn to the question of the standard under  
12 Federal Rule of Civil Procedure 15, leave to re-plead.  
13 Federal -- this federal rule, Rule 15, made applicable  
14 to adversary proceedings in the Bankruptcy Court by  
15 Federal Rule of Bankruptcy Procedure 7015 provides  
16 guidance on amending as a matter of course and with  
17 leave of Court. It also provides the framework within  
18 which courts consider requests for leave to re-plead.

19 Under Rule 15(a)(2), after the time for  
20 amending as of right has lapsed, "a party may amend his  
21 pleading only with the opposing party's written consent  
22 or the Court's leave. The Court should freely give  
23 leave when justice so requires," Rule 15(a)(2).

24 In this context it is fair to say that Rule  
25 15(a)(2) gives the Court wide discretion to grant or

1 deny leave to re-plead. And as the Second Circuit has  
2 explained, it is proper to deny leave to re-plead under  
3 this rule where there is no merit in the proposed  
4 amendment or amendment would be futile. Owen vs.  
5 Singer, 4 F. Appendix, 38, at 40, Second Circuit  
6 (2001).

7 I turn now to the specific counts of the  
8 complaint, of the amended complaint, and the standard  
9 as articulated by the rules, the code, and the cases.  
10 I note again that it is the Court's task to accept the  
11 well pleaded factual allegations as true, to accept the  
12 factual allegations as true, and to draw all reasonable  
13 inferences in favor of the plaintiff, and I will  
14 consider whether these allegations state a plausible  
15 claim for relief. First, claim one.

16 In their first claim, the plaintiffs argue in  
17 substance that the debtor mislead the Court about the  
18 value of the property, and in so doing procured the  
19 confirmation order by persuading the Court that the  
20 good faith requirement of Section 1129 was satisfied.  
21 The record shows that the plaintiffs have alleged that  
22 the difference between the debtor's stated value of the  
23 property on its schedules, 14 million, and the ultimate  
24 sale price of the property, 30 million, was a  
25 misrepresentation by the debtor. That's the



1 allegation. The record also shows that the plaintiffs  
2 have plead additional factual assertions related to the  
3 title of the property and liens encumbering the  
4 property prior to the time of the debtor's filing of  
5 this bankruptcy case. But the plaintiffs have not  
6 alleged facts sufficient to show a connection between  
7 the ownership of the property, or the secured debt on  
8 the property, and the debtor's alleged mis-  
9 representation of its value through the statement set  
10 forth in the -- in the bankruptcy schedules.

11 In response to this claim, the defendant  
12 notes that the valuation provided to -- in the debtor's  
13 petition, and this is confirmed by the record, was  
14 identified as estimated and subject to appraisal by a  
15 court of competent jurisdiction.

16 To allege fraud in the procurement of a  
17 confirmation order through misrepresentation to the  
18 Court material to its good face (sic) analysis, the  
19 plaintiff must make plausible allegations which states  
20 as follows. First, a representation relevant to  
21 compliance with Section 1129; second, which was  
22 materially false; third, that was either knowingly  
23 false or made with reckless disregard for the truth;  
24 fourth, that was made to induce the Court to rely upon  
25 it; fifth, that the Court did rely on it; and sixth,

1       that as a consequence of such reliance, the Court  
2       entered a confirmation order; In Re Tantla Partners,  
3       229 BR., at 730.

4               I take first the first element, whether the  
5       plaintiffs have alleged that there was made a  
6       materially false representation in the context of  
7       Section 1129.

8               The plaintiffs argue in substance that a  
9       misrepresentation about the value of the property here  
10      would have been relevant to the Court's analysis of the  
11      debtor's compliance with the good faith requirement  
12      under Section 1129. But the plaintiffs do not set  
13      forth in their amended complaint allegations sufficient  
14      to show that the debtor made the materially false  
15      representation to the Court regarding the value of the  
16      property.

17              While the plaintiffs have identified to be  
18      sure a significant difference, millions of dollars, in  
19      the debtor's estimated value of the property at the  
20      outset of the case and the ultimate sale price, the  
21      debtor -- excuse me, the plaintiffs have not alleged  
22      facts sufficient to show how that statement in the  
23      debtor's petition at the outset of the case, that the  
24      value was estimated at a certain amount, was an actual  
25      -- was a -- was a materially false representation in

1 the context of the confirmation process. In addition,  
2 the plaintiffs do not otherwise allege facts to show,  
3 if they were proved, that the debtor made a materially  
4 false representation to this Court regarding the value  
5 of the property or otherwise in the context of Section  
6 1129.

7 For these reasons, and based on the entire  
8 record, and having scrutinized the entire record,  
9 including the amended complaint, I am satisfied that  
10 the defendant has shown that the plaintiffs have not  
11 alleged facts sufficient to plead the first element of  
12 this claim, that is that the debtor's representations  
13 as to the value of the property were materially false,  
14 or that more generally, the plaintiffs made a  
15 materially false representation relevant to Section  
16 1129.

17 I turn to the second element, whether the  
18 plaintiffs have alleged with particularity fraudulent  
19 intent by the debtor.

20 As noted previously, stating a claim for  
21 fraud in the procurement of the confirmation order  
22 requires the plaintiffs to allege facts to show that  
23 the debtor's misrepresentations were knowingly false,  
24 or at least recklessly so. In other words, the  
25 plaintiffs must allege actual fraudulent intent. In Re

1     Motors Liquidation Co., 462 BR., at 501. Pursuant to  
2     the Second Circuit's guidance, the allegations of fraud  
3     that will satisfy Rule 9(b) and demonstrate this  
4     necessary strong inference of fraudulent intent, the  
5     plaintiff's may either (1) allege facts to show that  
6     the debtor had "both motive and opportunity to commit  
7     fraud", or (2) allege facts "that constitute strong  
8     circumstantial evidence of conscious misbehavior or  
9     recklessness." Gettinge vs. Citizens Utilities, 228 F.  
10    3rd, at 168, 69, quoting Shields v. Citibank --  
11    CityTrust Bancorp.

12             As to the first path to alleging fraudulent  
13     intent, that is motive and opportunity, the plaintiffs  
14     argue that in general the debtor was motivated to  
15     mislead the Court into confirming its amended plan.  
16     However, the record shows that the plaintiffs do not  
17     make factual allegations sufficient to raise this above  
18     the level of motive to confirm a plan that may  
19     reasonably be associated with any plan proponent. And  
20     the record shows that the plaintiffs do not make  
21     factual allegations sufficient to show a motive for the  
22     debtor to make a material misrepresentation to the  
23     Court or to misrepresent the value of the property.

24             And while the fact that the debtors made  
25     representations throughout the plan confirmation

1 process and throughout this bankruptcy case may show  
2 that somehow the debtors technically had the  
3 opportunity through their course of representations to  
4 the Court to mislead the Court about the value of the  
5 property or in some other way with respect to the  
6 confirmation process, this simply is not and cannot be  
7 the same as allegations that the debtor had both motive  
8 and opportunity to commit fraud. Were it otherwise,  
9 then every debtor, and arguably every party who  
10 participates in the bankruptcy process, has the  
11 opportunity to represent to the Court and this element  
12 of this element would have no substance at all.

13 As explained by the Southern District of New  
14 York Bankruptcy Court in the In Re Motors Liquidation  
15 matter, as noted above, quoting, "though technically  
16 speaking any plan proponent putting forward a plan for  
17 confirmation has an opportunity to defraud the Court,  
18 in this context opportunity must mean something more.  
19 It should mean a juncture in the case where the plan  
20 proponent reaches the decision point or opportunity to  
21 present a plan that would not defraud the Court and  
22 elects not to do it," In Re Motors Liquidation Corp.,  
23 462 BR., at 507.

24 The record does not show allegations by the  
25 plaintiffs sufficient to show that the debtor had the

1 opportunity to present a higher valuation of the  
2 property to the Court and failed to do so, that -- or  
3 that otherwise the debtor somehow had fraudulent intent  
4 through demonstrated allegations of motive and  
5 opportunity to commit fraud.

6 With respect to the second path to alleging  
7 fraudulent intent, that is strong circumstantial  
8 evidence of conscious misbehavior or recklessness, here  
9 the plaintiffs have alleged that the difference between  
10 the value of the property stated in the petition and  
11 the ultimate sale price shows the fraudulent intent of  
12 the debtor. But here, for many of the same reasons,  
13 and in light of the debtor's statement that -- on the  
14 petition that that value is estimated, here again these  
15 allegations are simply not sufficient support to ground  
16 an inference that the debtor intended to mislead the  
17 Court about the value of the property or somehow  
18 intended to keep from the Court facts that would have  
19 revealed a different value of the property or charted a  
20 different path in the confirmation process. And  
21 separately, having scrutinized the entire record,  
22 including the entire amended complaint, the plaintiffs  
23 do not otherwise allege facts sufficient to show, if  
24 proved, that the debtor had fraudulent intent.

25 For these reasons, and based on the entire

1 record, I'm satisfied that the debtor has shown that  
2 the plaintiffs have not alleged with the particularity  
3 that may be required as to fraud, facts sufficient to  
4 show that the second element of their first claim,  
5 actual fraudulent intent of the debtor, has been  
6 adequate -- has been stated.

7 I turn to the third element, the question of  
8 whether plaintiffs have alleged reliance by the Court.  
9 Here of course the plaintiffs must allege facts  
10 sufficient to show that the debtor intended to induce  
11 the Court to rely on its misrepresentation, and that  
12 the Court did rely on that misrepresentation, and that  
13 that reliance produced the confirmation order.

14 The record shows that the plaintiffs have  
15 argued in a general way, and specifically as well, that  
16 the debtor's representations about the value of the  
17 property contributed to the Court's holding that the  
18 amended plan was proposed in good faith pursuant to and  
19 as required by Section 1129. But the plaintiffs have  
20 not alleged facts sufficient to show that the debtor  
21 intended to induce or was successful in inducing the  
22 Court to rely on that representation with respect to  
23 the property value. The plaintiffs have not alleged  
24 facts sufficient to show how the Court relied on that  
25 valuation, and in particular the initial valuation of

1 the property, in finding that the amended plan was  
2 proposed in good faith.

3 And it is worth noting that the District  
4 Court, considering many of these same arguments,  
5 issues, and concerned (sic) concluded and wrote that  
6 this Court's "determination that the plaintiffs  
7 proposed in good faith is unassailable," Emmons-  
8 Sheepshead Bay memorandum and order, 13 C.V., 5430, at  
9 star 20. That good faith conclusion is consistent with  
10 the conclusion that fraud did not contribute to the  
11 Court's good faith analysis and that there was not  
12 fraud and has not been alleged in a plausible way fraud  
13 in the inducement of the confirmation order. And  
14 separately, based on the entire record, which I have  
15 scrutinized with care, the plaintiffs do not otherwise  
16 allege facts, nor does there appear to be a plausible  
17 basis to allege facts sufficient to show, if proved,  
18 the required reliance elements of the Section 1144  
19 claim.

20 For these reasons, and based on the entire  
21 record, the defendant has shown that the plaintiffs  
22 have not alleged facts sufficient to show that the  
23 debtor intended to induce the Court to rely on its  
24 representation regarding the value of the property,  
25 that the Court did not rely on the -- excuse me, that



1 the Court did rely on the representation, or that the  
2 Court's reliance procured the confirmation order. For  
3 these reasons, all of these reasons, and based on the  
4 entire record, the debtor -- the defendant has shown  
5 that the plaintiff's first claim, claim one, does not  
6 adequately allege, with particularity where required,  
7 facts sufficient to show fraud in the procurement of  
8 the confirmation order through misrepresentation,  
9 including a misrepresentation about the value of the  
10 property, and more generally, defendant has shown, has  
11 met its burden to show that claim one does not state a  
12 claim for revocation of the confirmation order pursuant  
13 to Bankruptcy Code Section 1144. For these reasons,  
14 and based on the entire record, the defendant's motion  
15 to dismiss claim one is granted.

16 I turn to claim two and the question of  
17 whether it states a claim, meaning a plausible claim  
18 for relief under Section 1144 or otherwise.

19 In their second claim the plaintiffs assert  
20 that the property was not property of the estate  
21 pursuant to Bankruptcy Code Section 541 because it was  
22 transferred to the debtor from its predecessor, Emmons,  
23 for no consideration and outside the ordinary course of  
24 business. The plaintiffs argue in substance that had  
25 this information been disclosed to the Court, the

1 amended plan would not have been confirmed because the  
2 sole asset that supports the plan was not part of the  
3 bankruptcy estate.

4 The record shows that the plaintiffs allege  
5 that there was a history of transfers of the property  
6 and encumbrances on the property prior to the debtor's  
7 bankruptcy filing. The record also shows similar  
8 allegations and arguments about deceptions surrounding  
9 transfers of the property were previously presented to  
10 the Court at many times and in many ways, including in  
11 the plaintiff's objections to the debtor's original  
12 disclosure statement and the debtor's second amended  
13 disclosure statement. The record also shows that these  
14 points were also alleged in the plaintiff's objection  
15 to confirmation of the amended plan. The record shows  
16 that the plaintiffs set forth a detailed chronology of  
17 the property's history prior to the bankruptcy filing,  
18 and that the property was -- excuse me, the record  
19 shows that the plaintiffs also alleged that the  
20 property was subject to a constructive trust pursuant  
21 to a judgment entered by the state court.

22 The plaintiffs appear to argue in substance  
23 that the debtor misrepresented some or all of the  
24 existence of this alleged judgment to the Court and  
25 this history to the Court. The Court notes that while

1 the Court does and must take the plaintiff's well  
2 pleaded allegations to be true, now reverting to the  
3 guidance provided by the Supreme Court in the Twombly  
4 case, factual allegations must be enough to raise a  
5 right to relief above the speculative level, Twombly,  
6 550 U.S., at 555. In fact the record shows, and a  
7 thorough review of the record shows that the state  
8 court did not enter a judgment that adjudicated the  
9 plaintiff's allegations of a constructive trust, and  
10 the plaintiffs have not alleged the existence of some  
11 judgment to the contrary. And as the District Court  
12 stated, the record does not reflect any "state court  
13 judgment in Metropolitan's favor finding that a  
14 constructive trust existed, much less such a verdict or  
15 judgment before this Court confirmed the plan,"  
16 Emmons-Sheepshead's Bay memorandum and order, 13 C.V.,  
17 5430, at star 21.

18 For these reasons and as such, the defendant  
19 has shown that the plaintiff's allegation about the  
20 status of the property are not sufficient to show that  
21 the debtor made a misrepresentation to this Court in  
22 the absence of allegations sufficient to establish the  
23 pleading of such a misrepresentation. The defendant  
24 similarly has shown that the plaintiffs do not allege  
25 facts sufficient to show that the debtor had a

1 fraudulent intent in making such a misrepresentation.  
2 The defendant likewise has shown that the plaintiffs do  
3 not allege facts sufficient to show that reliance by  
4 the Court on any such misrepresentation as to the  
5 property status occurred, and the plaintiffs do not  
6 otherwise allege facts, based on a review of the entire  
7 record, related to the history of the status of the  
8 property, the liens, the encumbrances, or the  
9 transfers, sufficient to show, if proved, the relief --  
10 the reliance elements of the claim, including a  
11 possible claim under Section 1144 that they seek to  
12 assert under their claim three.

13 For all these reasons, and based on the  
14 entire record, the defendant has shown that the  
15 allegations by the plaintiff in claim two regarding  
16 among other things the validity of the transfer of the  
17 property, the property status as property part of the  
18 estate, and alleged misrepresentations related to those  
19 issues are not sufficiently pleaded plausibly to state  
20 a claim of fraud in the procurement of the confirmation  
21 order. And for those same reasons, the defendant has  
22 shown that claim two does not state a claim for  
23 revocation of the confirmation order pursuant to  
24 Bankruptcy Code Section 1144. For these reasons and  
25 based on the entire record, the defendant's motion to

1 dismiss as to claim two is granted.

2 I turn to claim three and the question of  
3 whether it states a plausible claim for relief under  
4 Section 1144 of the Bankruptcy Code or under any other  
5 grounds.

6 In their third claim the plaintiffs allege  
7 that the amended plan violates the absolute priority  
8 rule because the principal of the debtor benefits from  
9 the amended plan, but the unsecured creditors do not.  
10 The plaintiffs also allege that the lender, counsel,  
11 and principal of the debtor colluded to abuse the  
12 bankruptcy process for their personal benefit. And the  
13 plaintiffs allege in substance that the debtor  
14 committed fraud by withholding information in the  
15 debtor's records about the sale of the property to the  
16 debtor, and about the eventual sale of the property by  
17 the debtor under the amended plan.

18 First, Section 1144 expressly limits, as I  
19 have noted earlier, the basis for revocation of a  
20 confirmation order to fraud. "Given concerns about the  
21 finality of a confirmed plan, it is well established  
22 that a confirmation order may be revoked only if it was  
23 procured by fraud," In Re R. Capital Bank BSC (2014),  
24 Westlaw 6435522 at star 7, Bankruptcy Southern District  
25 of New York, November 17, 2014.

1           The defendant here has shown by its motion,  
2           and the entire record is consistent with the showing,  
3           that the plaintiff's allegations regarding the absolute  
4           priority rule, even if true, taken as true, are  
5           unrelated to fraud, and as such are insufficient to  
6           state a claim for relief under Section 1144. And  
7           separately, if somehow they were to form the basis of  
8           an argument or an allegation that there was somehow  
9           fraud in the debtor's efforts to advance their plan and  
10          procure the confirmation order, the plaintiff has not  
11          alleged sufficiently facts to show that that would be a  
12          basis for relief under this claim.

13          Section 1144 provides a basis for revocation  
14          of confirmation of a plan solely for fraud in  
15          procurement of the plan, and this too is worth  
16          consideration. The plaintiff's allegations about  
17          events after the entry of the confirmation order would  
18          be highly unlikely to be allegations of events that  
19          would have contributed to procuring the order in the  
20          first place. I do not rule out the possibility that  
21          post-confirmation events might somehow be probative or  
22          persuasive in the appropriate context of pre-  
23          confirmation events, but that is not the record here.

24          As such, for these reasons and based on the  
25          entire record, the defendant has shown that the

1 plaintiff's allegations about disclosure of information  
2 concerning the sale of the property pursuant to the  
3 confirmed amended plan are not adequate as a basis to  
4 state a claim for relief under Section 1144 or  
5 otherwise under the plaintiff's Count Three, and do not  
6 provide a basis to conclude that the plaintiffs in this  
7 count or in any of the other counts have set forth a  
8 plausible claim for relief.

9           Finally, the plaintiffs make allegations  
10 which might fairly be described as conclusory about  
11 fraud by the debtor's principal and about an alleged  
12 conspiracy between the debtor, its counsel, and  
13 creditors to defraud the Court. As the Supreme Court  
14 has explained, using language which is strong but  
15 appropriate, threadbare recitals of the elements of a  
16 cause of action supported by mere conclusory statements  
17 to not suffice to plead a claim, Iqbal, 556, U.S., at  
18 678.

19           Based on the entire record, to which the  
20 Court is not a stranger, the Court is satisfied that  
21 the defendant by this motion has shown that the  
22 plaintiffs do not allege facts sufficient to show or  
23 make out a plausible allegation of a conspiracy among  
24 any or all of the debtor, its counsel, and creditors,  
25 to defraud the Court. I should add that if there were

1 even the suggestion of such a fraudulent conspiracy in  
2 the record, this Court would be at pains to be sure  
3 that those matters could be heard fairly and fully.  
4 That is not the case here.

5 I note that in the context of pleading fraud,  
6 Rule 9(b) specifically aims to safeguard, now quoting,  
7 "a defendant's reputation and good will from  
8 improvident charges of wrongdoing" as well as to  
9 provide a party notice of the specific factual  
10 allegations of fraud that it can refute, Ross vs.  
11 Bolton, at 904, F.2nd 819, 823, Second Circuit (1990).  
12 Fraud is a serious matter. In the appropriate context,  
13 it can be the basis for a criminal action. It should  
14 not be lightly alleged. It should, needless to say,  
15 not be lightly undertaken. It should never be  
16 undertaken in the context of a court proceeding. For  
17 that reason, Rule 9(b) applies a heightened standard to  
18 the allegations of a claim of fraud.

19 Having that in mind, and I should add even  
20 adding a lower -- even measured at a lower standard,  
21 I'm satisfied that the defendant has shown that the  
22 allegations here, the reasonable inferences that they  
23 support of a conspiracy between or among some or all of  
24 the debtor, its principals, the debtor attorney, and  
25 the debtor's creditors, are not sufficient to make out



1 a claim under the debtor's claim three, nor are they  
2 sufficient to state a plausible claim or suggest the  
3 existence of a plausible claim of fraud in the  
4 procurement of the confirmation order.

5 Additionally, the plaintiffs do not otherwise  
6 allege facts related to a conspiracy or the prospect of  
7 a conspiracy or the withholding of information from the  
8 Court or provision of misinformation to the Court  
9 sufficient to show, if proved, the required reliance  
10 elements of a Section 1144 claim, or any other claim  
11 that may be alleged in the plaintiff's count three.

12 For all these reasons, and based on the  
13 entire record, the defendant has shown that the  
14 allegations by the plaintiff in claim three, that among  
15 other things the debtor withheld information and that  
16 there was a conspiracy between or among some or all of  
17 the debtor, its counsel, and the principal, are not  
18 sufficient to state a claim of fraud or plausibly to  
19 suggest a claim of fraud in the procurement of the  
20 confirmation order.

21 As a consequence and thus the debtor has  
22 shown that claim three does not state a claim for  
23 revocation of the confirmation order pursuant to  
24 Bankruptcy Code Section 1144 or otherwise. For these  
25 reasons, and based on the entire record, the

1 defendant's motion to dismiss claim three is granted.

2 Finally I turn to the debtor's -- excuse me,  
3 the plaintiff's claim four. In this fourth claim the  
4 plaintiffs allege that the Court's denial of their  
5 discovery request and the debtor's withholding of  
6 material information constitute a due process violation  
7 and a basis for revoking the confirmation order.

8 The plaintiffs allege that after the Court  
9 issued a scheduling order setting out discovery  
10 deadlines for June 21, 2013, the debtor negotiated in  
11 bad faith to prevent the plaintiff from seeking that  
12 discovery. The record shows that on June 18, 2013, the  
13 plaintiff requested a further extension of discovery  
14 and that the Court denied that request.

15 I turn back to the standard under Section  
16 1144 which expressly limits the basis for revocation of  
17 a confirmation order to fraud. Again, finality  
18 matters. Now quoting, "Given concerns about the  
19 finality of a confirmed plan, it is well established  
20 that a confirmation order may be revoked only if it was  
21 procured by fraud," In Re R. Capital Bank (2014)  
22 Westlaw 6145522 at star 7, Bankruptcy Southern District  
23 of New York, November 17, 2014.

24 I note second that the District Court  
25 rejected, specifically rejected due process claims that

1 are substantially similar, perhaps even identical to  
2 these that are being asserted by the plaintiffs in  
3 their amended complaint. The District Court studied  
4 and described closely all of the process afforded to  
5 the plaintiffs leading up to, during, and at the  
6 confirmation process and hearing, and held that "the  
7 Bankruptcy Court assiduously protected Metropolitan's  
8 due process rights during the proceedings below, and  
9 Metropolitan participated aggressively at each stage of  
10 the pre-confirmation bankruptcy process. The premise  
11 that Metropolitan denied -- was denied due process is  
12 simply unsupportable," Emmons-Sheepshead Bay  
13 memorandum and order, 13 C.V., 5430 at star 17. That  
14 is to say the Court, this Court did its best to do its  
15 job. Counsel did the same. But losing an argument,  
16 not prevailing in an objection, not persuading the  
17 Court of the merits of your position is simply not the  
18 same as a denial of due process.

19 Finally, the record shows that the  
20 plaintiff's allegations that the debtor negotiated in  
21 bad faith in order to induce the plaintiffs to fail to  
22 seek discovery and in order to avoid the disclosure of  
23 certain information related to the property requires  
24 some intention. The debtor has shown that the  
25 plaintiffs do not make allegations by these averments

1 sufficient to show how these events would or could have  
2 contributed to fraud in the procurement of the  
3 confirmation order. In particular, the defendant has  
4 established that the plaintiffs do not allege facts  
5 sufficient to show or to support an inference that the  
6 debtor made representations to the Court related to  
7 discovery or settlements or that, viewed more broadly,  
8 and having been a participant as the Court in this --  
9 in these hearings, that there was the kind of  
10 misrepresentation or even incomplete statement on the  
11 record with and to the Court that would support a  
12 conclusion or even a suggestion that a  
13 misrepresentation was made to the Court to induce a  
14 determination leading to the confirmation order, or  
15 even leading to an intermediate ruling in this case,  
16 including with respect to the request for an extension  
17 of discovery.

18           The defendant has also shown in its motion  
19 and by its arguments that the plaintiffs do not allege  
20 facts sufficient to show that the debtor's conduct  
21 procured the surrounding discovery confirmation order  
22 by influencing or changing the votes of other creditors  
23 who did support confirmation of the amended plan. And  
24 this Court's separate and independent scrutiny of the  
25 entire record of this case and the bankruptcy main case

1 is consistent with that view.

2 In addition and separately, the plaintiffs do  
3 not otherwise allege facts related to discovery during  
4 the debtor's Bankruptcy case, the confirmation process,  
5 or this case, sufficient to show that in any respect  
6 there was other than the greatest respect for the  
7 plaintiff's due process rights, and that for the same  
8 reasons that any facts have been alleged that if proved  
9 would establish the required reliance element of a  
10 Section 1144 or other claim as is asserted under the  
11 plaintiff's claim four.

12 For these reasons, and based on the entire  
13 record, the defendant has shown that the allegations by  
14 the plaintiffs in claim four that among other things  
15 their due process rights were violated, are simply not  
16 sufficient plausible to state a claim of fraud in the  
17 procurement of the confirmation order. I should note  
18 that as the Judge and being the Court in which that  
19 process took place, if any aspect of my review of the  
20 record in this adversary proceeding, in the bankruptcy  
21 case, in the context of this motion, or sua sponte, if  
22 I had a concern that due process, constitutional due  
23 process had not been served, it would be the Court's  
24 task to fix that, and that would be fixed. I am  
25 satisfied based on the entire record, having had the

1 opportunity thoroughly to revisit, that due process to  
2 each and all of the parties here was -- that the  
3 requirements of due process were met, that the  
4 interests of due process were served. Again I note not  
5 succeeding in your claim is simply not the same as a  
6 denial of due process.

7 For all these reasons, based on the entire  
8 record, I'm satisfied that the defendant has shown that  
9 the plaintiffs have not set forth a claim for  
10 revocation of the confirmation order pursuant to  
11 Bankruptcy Section Code -- Bankruptcy Code Section 1144  
12 or otherwise in claim four. And for these reasons and  
13 based on the entire record, the defendant's motion to  
14 dismiss as to claim four is granted.

15 Finally, finally, I turn to the question also  
16 posed by Section 1144. And I have to apologize to the  
17 parties because there may be one more finally after  
18 this which is the question of leave to re-plead. But  
19 Bankruptcy Code Section 1144 separately and  
20 independently requires the Court to consider the  
21 question of whether a remedial order could be crafted  
22 that would protect the rights of innocent third parties  
23 under the confirmed plan. This goes back to the  
24 important notion of finality fundamental to the  
25 Bankruptcy process, especially in the context of

Chapter 11.

In order to state a claim for relief under Section 1144, the plaintiffs must demonstrate that the Court could craft a remedial order while protecting the rights of "any entity acquiring rights in good faith reliance on the order of confirmation," Section 1144(1). As explained by the Southern District of New York Bankruptcy Court, this requirement matters. As that Court found, "if a Court cannot fashion a revocation order that protects innocent third parties who acquired rights in reliance on the confirmation order, the Court is barred from revoking the confirmation order, even if the order was procured by fraud," In Re Delta Airlines Inc., 386 BR., at 532. Strong language, strong language that is underpinned by the importance of finality.

Here the record shows that the plaintiffs expressly seek to unwind the sale of the property to 3112 Emmons Loft LLC, or the buyer. The plaintiffs allege that the buyer is not an innocent or outside party, but rather a sham entity created as part of an alleged conspiracy by the debtor and its counsel. But as noted above in the context of the plaintiff's allegations of conspiracy, now quoting, I recognize the language is strong, "threadbare recitals of elements of

1 a cause of action supported by mere conclusory  
2 statements do not suffice to plead a claim," Iqbal, 556  
3 U.S., at 678.

4 The plaintiffs make conclusory allegations,  
5 they do not make persuasive allegations, that 3112  
6 Emmons Loft LLC did not acquire its rights to the  
7 property in good faith reliance on the order of  
8 confirmation. So here too and separately, the  
9 defendant has shown the allegations of the amended  
10 complaint count by count or taken as a whole and the  
11 reasonable inferences that they support are not  
12 sufficient to show that this requirement of relief  
13 under Section 1144 could be met. That is to say that  
14 the buyer of the property is not an entity acquiring  
15 rights in good faith reliance on the order of  
16 confirmation pursuant to Section 1144. As such, for  
17 these reasons and based on the entire record, the  
18 defendant has shown that the plaintiffs have not stated  
19 how the Court could grant the relief they seek while  
20 protecting the rights of the purchaser, the buyer here  
21 of the property. And therefore, using the words used  
22 in the Delta decision, this Court, even if fraud were  
23 somehow in this record, and I do not find that it is, I  
24 find that it is not alleged, the Court similarly would  
25 not be able to revoke the confirmation order.



1 I turn next to the discretion afforded this  
2 Court under Section 1144 and whether this weighs in  
3 favor or against (indiscernible/noise).

4 The parties disagree on how much discretion  
5 the Court has. That's not a surprise. Section 1144  
6 provides the Court the discretion to revoke this order,  
7 but doesn't require the Court to do so if the standards  
8 governing the exercise of that discretion are not met.  
9 Revocation pursuant to Section 1144 is discretionary  
10 and, as the bankruptcy court found in the Trico Marine  
11 case, "the Court may need not revoke the confirmation  
12 order if it finds fraud," 337 BR., at 811, 814.

13 The record shows that the plaintiffs have had  
14 many opportunities to be heard and to litigate the  
15 issues that they now present in the various counts of  
16 their amended complaint. The Court has thoroughly  
17 considered the good faith of the debtor at several  
18 junctures. And I will say that every time we have a  
19 status conference in a Chapter 11 case, the Court is  
20 mindful of the need to move forward in good faith, and  
21 whether in words are the record -- on the record or  
22 simply in substance is always mindful of the question  
23 of good faith. It was specifically put to the Court  
24 for determination from time to time in this case at  
25 several junctures, including, among others, at the

1 point of confirmation. The Court thoroughly considered  
2 the good faith of the debtor at confirmation in the  
3 face of allegation and argument, heated argument at  
4 times by the plaintiffs, their creditors, that the  
5 debtor had acted deceptively, improperly and the like.  
6 Based on the entire record, after extensive argument  
7 and careful consideration, the Court held that the  
8 amended plan was proposed in good faith. Nothing that  
9 has happened since that determination has changed this  
10 Court's view that indeed the amended plan was proposed  
11 in good faith.

12 The Court reconsidered nearly identical  
13 allegations by the plaintiff made in the motion to  
14 vacate the confirmation order, and that order was  
15 upheld. On appeal the plaintiffs again attempted to  
16 persuade a different Court, a Court with the ability to  
17 take a fresh look at the entire record to the District  
18 Court make these arguments, and that Court too found  
19 that the arguments were not persuasive.

20 For the reasons stated, based on the entire  
21 record, noting that this is far from the first time  
22 that this Court or a Court has had the opportunity  
23 carefully to consider these matters, I'm satisfied that  
24 to the extent that this matter is within the discretion  
25 of the Court, the defendant has shown and this Court

1 independently concludes that the circumstances of the  
2 case indicate that the Court -- the Court's discretion  
3 weighs in favor of dismissal of the amended complaint,  
4 because among so many other reasons, it would be  
5 impractical and inequitable to revoke the confirmation  
6 order of the debtor's amended plan at this time.

7 I turn to the question again finally of  
8 whether the plaintiff should be granted leave to re-  
9 plead. Courts have discretion in granting leave to  
10 re-plead, and in the appropriate circumstance, Courts  
11 wisely conclude, and this Court has often concluded  
12 that leave to re-plead, which should be freely granted,  
13 is appropriate. Here I find that the plaintiffs,  
14 unlike so many other cases, here the plaintiffs have  
15 not demonstrated in this proceeding or in the other  
16 proceedings that I rule on the record before me  
17 specifically, there is not demonstrated an ability to  
18 bring forth new allegations that would be sufficient  
19 plausibly to state a claim of fraud in the procurement  
20 of the confirmation order or for relief in the nature  
21 of undoing the confirmation order for any of the  
22 grounds asserted in the first, second, third, or fourth  
23 claims set forth in the amended complaint.

24 I note that this complaint has been amended  
25 once already, and that the proceedings in this case and

1 in the bankruptcy case have been extensive. I note  
2 also that the record indicates that the plaintiffs had  
3 an extended opportunity to amend the original complaint  
4 leading to the complaint that is before the Court. The  
5 record shows that the allegations in the amended  
6 complaint in this form and in other forms in substance  
7 to a great extent have been argued before this Court  
8 several times and have also been argued by a Court with  
9 the ability freshly to consider the arguments, the  
10 District Court on appeal. I note that the plaintiffs  
11 objected to the second amended disclosure statement on  
12 grounds including that the debtor omitted information  
13 that the plaintiffs were still seeking discovery about  
14 the chain of title of the property and alleged  
15 unauthorized changes to the lien on the property, that  
16 there were similar arguments made in the context of the  
17 debtor's alleged withholding of information in the  
18 context of extending discovery and the objection to the  
19 amended plan where it was argued that the plan was not  
20 proposed in good faith due among other things to  
21 deceptive conduct by the debtor, and at many other  
22 junctures the same or similar arguments have been  
23 advanced.

24 As such, and based on the entire record, I'm  
25 satisfied that not -- that in the complaint, in the

1 amended complaint, and in all of the proceedings had  
2 and determined where these issues have been raised,  
3 zealously and I'll say effectively, it's hard to  
4 imagine how they could have been more effectively  
5 argued, the plaintiffs have had the opportunity to  
6 litigate these allegations. They've been disclosed to  
7 the creditors before their votes on the plans. They've  
8 been part of the record in so many ways as indicated by  
9 the extensive docket of the bankruptcy case, where  
10 after all the confirmation order was entered, and now  
11 of course in this adversary proceeding after but  
12 importantly -- (tape change) -- also before prior to  
13 the entry of the confirmation order, and that also the  
14 plaintiffs moved to vacate the confirmation and  
15 appealed the denial of that motion to the District  
16 Court here and there, in the Bankruptcy Court and the  
17 District Court, arguments of due process and -- and the  
18 other arguments that are in substance and that underlie  
19 each of the four counts here were made, each of those  
20 arguments carefully, thoughtfully considered, carefully  
21 thoughtfully overruled by this Court and the Bankruptcy  
22 Court.

23 Based on that record, based on that record,  
24 based on the record before me, mindful of the standard  
25 applicable with respect to leave to re-plead and motion

1 to dismiss, mindful of the fact that further pleading  
2 would impose additional costs on all the parties, but  
3 including the defendant here, the debtor, who has  
4 litigated or re-litigated these allegations, that have  
5 been found to be without merit now more than a year and  
6 a half -- well I should say more than a year,  
7 approaching a year and a half after confirmation of the  
8 amended plan, I'm satisfied that the standard for leave  
9 to re-plead is not met here, that it would be futile  
10 for leave to re-plead to be granted. And so based on  
11 the entire record, I conclude that leave to re-plead  
12 should be denied and dismissal should be with  
13 prejudice.

14 For these reasons, all of these reasons,  
15 based on the entire record, I conclude, I find and  
16 conclude that the defendant's motion to dismiss is  
17 granted, the amended complaint is dismissed, dismissal  
18 is with prejudice and without leave to re-plead, and  
19 the Court will enter appropriate order.

20 I note that this oral decision has taken more  
21 than an hour to issue, perhaps an hour and 20 minutes.  
22 It is therefore nearly -- first of all, I thank you for  
23 your patience in listening. Second, I note that it is  
24 inevitable that to some extent I may have mis-stated a  
25 citation or a quotation. I incorporate the record of

1 the adversary proceeding, the bankruptcy case, in these  
2 -- in my ruling, in my findings and conclusions. And  
3 for all of those reasons, again thanking the parties  
4 for their patience, that will be the Court's  
5 determination on the motion. The pretrial conference  
6 will be marked off the calender. We'll do our best to  
7 enter an appropriate order that will incorporate by  
8 reference today's oral ruling. Thank you very much for  
9 your time.

10 I need to confer briefly with my courtroom  
11 deputy to determine whether there's anything else we  
12 need to do. If you need a moment to -- you'll have  
13 that moment. It may take us a minute or two to come  
14 back. We'll remain, however, on the record.

15 (Pause)

16 THE COURT: All right. Back on the record.  
17 I'm reminded by Miss Jackson that we need a date for  
18 status on the main case. May I hear from debtor's  
19 counsel as to, and also from Mr. Curtin as to what time  
20 frame would be appropriate for that.

21 MS. SCHWARTZ: Judge, this is Lori Schwartz  
22 for the debtor. In terms of a status conference, I  
23 would suggest 60 days. We'll have our December  
24 disbursements on file by then and can do a  
25 reconciliation with the Trustee's office with respect

1 to fees and then see what we need to do to work with  
2 them to arrange for a payment to be made on those  
3 outstanding obligations.

4 THE COURT: Is there a particular week that  
5 you're focusing on or portion of a month? I'm trying  
6 to get a sense. Mr. Curtin, this strikes me as  
7 something that we should probably be looking out to  
8 perhaps February for. But I -- if a sooner date is  
9 helpful to the parties in moving this forward, I want  
10 -- I want to do whatever works best for each and all of  
11 you. February 20th at 9:30?

12 (Judge speaks to clerk)

13 THE COURT: That's our Chapter 11 day that  
14 month. Does that work for the parties?

15 MS. SCHWARTZ: February 20th, Judge?

16 THE COURT: February 20th at 9:30.

17 MS. SCHWARTZ: Debtor is available that day,  
18 yes.

19 THE COURT: All right. February 20th at  
20 9:30. That'll be our adjourned date for status. And  
21 the other matters have been resolved as indicated.  
22 Again, it must be a long afternoon indeed to have to  
23 sit and listen to a Court rule. I'm grateful for your  
24 indulgence. And I wish you a good evening and a good  
25 weekend. Thank you so much.



1 MS. SCHWARTZ: Thank you, Judge.

2 CLERK: The court session is ended.

3 MR. DAHIYA: Judge? Hello?

4 THE COURT: Mr. Dahiya, we're --

5 MR. DAHIYA: (Indiscernible/static) objection  
6 to the plaintiff's claim that was filed. And I think  
7 we need a resolution of that.

8 THE COURT: Mr. Dahiya, I think at this point  
9 I have ruled. I have ruled at length. I'm not --

10 MR. DAHIYA: No, no, (indiscernible/static).

11 THE COURT: I'm not certain what you refer  
12 to.

13 MR. DAHIYA: (Indiscernible/static) filed by  
14 the other party, and (indiscernible) the debtor filed  
15 an objection, Your Honor. And --

16 THE COURT: All right. Is that something we  
17 can take up at the -- at the status conference? Sounds  
18 like status.

19 MR. DAHIYA: (Indiscernible/static.)

20 THE COURT: Mr. Dahiya, may I invite you to  
21 confer with Miss Jackson on scheduling on Monday?

22 MR. DAHIYA: I'll do that, Judge.

23 THE COURT: Okay. Thank you very much.  
24 Thank you so much.

25 MR. DAHIYA: Bye.

1 THE COURT: All right. Bye bye.

2 CLERK: The court session is ended. Thank  
3 you.

4 (Proceedings Concluded)

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C E R T I F I C A T I O N

I, Linda M. Noce, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the United States Bankruptcy Court, Eastern District of New York, on December 12, 2014, index 3:46:27 - 5:27:49, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded, and to the best of my ability.

Linda M. Noce, Jr

February 23, 2015

Linda M. Noce, AOC #377

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